Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JIMMY VITELA and JESSE VITELA,
Petitioners,

v.

THE STATE of TEXAS,
Respondent.

On Petition For Writ of Certiorari
To The First Court of Appeals of Texas
at Houston, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, after viewing all the evidence in the light most favorable to the Court's judgment, any rational fact finder could have found all the essential elements *proven* (not merely *presumed*) beyond a reasonable doubt, to sustain a conviction for "illegal investment" of funds that Petitioners knew or believed were intended to facilitate the commission of the offense of possession of cocaine, thus complying with the controlling standard of sufficiency of probative evidence in criminal cases defined by this Court in *Jackson v. Virginia*, 443 U.S. 307, 319, some sixteen years ago.

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No._____

IN THE
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OCTOBER TERM, 1995

JIMMY VITELA and JESSE VITELA,
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v.

THE STATE of TEXAS,
Respondent.

On Petition For Writ of Certiorari
To The First Court Of Appeals of Texas
at Houston, Texas

JURISDICTION

The appeals of both petitioners to this Court were consolidated in this single Petition for the Writ of Certiorari because the facts and issues raised were either very similar or identical: both were jointly prosecuted for the same alleged offense in the same court at the same time, namely, for "illegal investment" in cocaine, a violation of § 481.126(a)(2) of the Texas Health & Safety Code.

The issue presented by both here is identical: whether the evidence is sufficient under the standard announced by *Jackson v. Virginia,* 443 U.S. 307, 319, to sustain the conviction, after a rational fact-finder views *all* the evidence in the light most favorable to the court's judgment to determine whether *all* the essential elements of the offense have been proven beyond a reasonable doubt.

The divided Opinion of the First Court of Appeals in the case of Petitioner Jesse Vitela was delivered on March 16, 1995 (App. B, pp. 18a-28a). On May 16, 1995, the Court of Criminal Appeals granted Counsel's motion for an extension of time to file Appellant's Petition for Discretionary Review (App. B, p. 17a), which was timely filed on June 7, 1995, and refused on August 23, 1995 (App. B, p. 14a).

This Petition is timely, having been duly filed on November 21, 1995, the 90th day following the refusal of the Texas Court of Criminal Appeals to grant Petitioner's Petition for Discretionary Review.

The Opinion of the First Court of Appeals in the case of Jimmy Vitela was delivered on March 9, 1995 (App. A, pp. 7a to 13a). His motion for an extension of time to file his motion for Rehearing was duly granted on April 6, 1995, the same day it was duly filed (App. A, p. 5a). Following that extension, Petitioner duly moved for an extension of time to file his Petition for Discretionary Review to June 19, 1995. The Court of Criminal Appeals acknowledged timely receipt of Appellant's Petition for Discretionary Review on June 13, 1995, and refused said Petition on August 23, 1995.

This Petition is again timely, having been duly filed on November 21, 1995.

Jurisdiction of these causes is invoked pursuant to 28 U.S.C.§ 1257 (3).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

BEST AVAILA

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ..."

TEXAS PENAL HEALTH & SAFETY CODE

The statute provides in pertinent part that:

(a) A person commits an offense if the person knowingly or intentionally:

(2) finances or invests funds the person knows or believes are intended to further the commission of an offense listed in Subdivision (1).

TEX. HEALTH & SAFETY CODE ANN. § 481.126(a)(2)

(a) A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.

STATEMENT OF THE CASE

The record reveals that Rudy Amador, an undercover police officer employed by the City of Pasadena and the first of the State's four witnesses, testified that he had a series of phone calls from one of the Petitioner's two Co-Defendants, Ramon Diaz, wanting to purchase some cocaine. Amador said that he could get Diaz some 20 kilograms for about $16,000.00 a kilogram. (S/F 14). On May 26,1993, after several more phone calls, the two men met and, according to

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plan, Amador followed Diaz to a Mexican bar ("El Mariachi"), where both went inside and had some beer (S/F 30).

After some time "Chewy" (later identified as Jesus Fuentez) came to the bar and had a discussion with Diaz, which Amador did not hear (S/F 32). In a few more minutes, Defendant Jimmy Vitela arrived at the bar, sat next to Amador, and talked with Chewy. Amador heard Jimmy say, "Yes, the money, it's in a black backpack and it's behind the overhead seat." (S/F 34). *The Record reflects the fact that Amador did not have or overhear any other conversation with or about Jimmy Vitela except to the extent described in this paragraph.* Shortly after that statement was made, Amador walked outside the bar with Chewy and Diaz, leaving Jimmy Vitela alone in the bar. Chewy and Diaz led Amador to "a gray T-bird", inside of which was Petitioner Jesse Vitela, sitting on the passenger side. Chewy motioned by hand for Jesse Vitela to exit the car as Amador and Chewy walked up to it. Amador entered the car and closed the door as Chewy reached behind the driver's seat and handed Amador a black backpack containing the money. Amador unzipped the backpack, saw a large sum of money filling up the bag and, without counting it, closed it back up and placed it behind the driver's seat.

While Amador was examining the contents of the bag, Jesse Vitela was standing outside the vehicle several feet away on the passenger side and Jimmy Vitela was inside the bar. Both were beyond visible and hearing proximity. Both Amador and Chewy then exited the vehicle and Jesse re-entered the driver's side to enable him to move the car so that it would not thereafter block Diaz's car (S/F39).

It is reflected in the record that Amador had no conversation and conducted no negotiations with Jesse Vitela

at any time, nor were there any exculpatory admissions or conversations with Jesse Vitela shown in the record.

Upon leaving the bar, Amador signaled his raid team (by means of his "body mike") that the money was in the backpack behind the front seat of the T-bird, and drove off to Pasadena followed by Diaz, purportedly to pick up the cocaine. As soon as Amador left the bar, Amador's back-up undercover officers immediately arrested the Petitioners at the restaurant and seized the money.

The State's third witness was officer Timothy Lee Smith, a member of the Pasadena Police Department for twelve years. Smith's function in this case was initially to have introduced the confidential informant, Al Crun, to officer Amador (S/F 74-75), and his subsequent participation was as a surveillance or "back-up" officer for Amador.

Smith testified that at prior meetings between Officer Amador and Ramon Diaz he was never able to overhear any conversations between them or see Diaz transfer or give anything to Officer Amador (S/F 83). Nor did he give any information about either of the Vitela petitioners.

The Record shows that the funds were both present in the car and displayed for the express purpose of inducing the purchase of the cocaine. *Rezapour v. State*, 817 S.W.2d 67,69 (Tex. Crim. App. 1991). *But there was no testimony whatsoever showing that Jesse Vitela knew about the funds* or participated in any way in displaying them or in negotiating for the purchase of the cocaine. He remained in the car during the entire time that Amador and Diaz were negotiating the cocaine sale. Moreover, there was no proof that the vehicle belonged to or had even been in Jesse Vitela's possession for such period of time and under such circumstances as would affirmatively link him to the contraband.

Neither Amador nor any other witness testified that either petitioner had ever asked to purchase anything from him, or discuss the purchase, nor did Jesse or Jimmy give Amador any money, or ever negotiate for the purchase of any controlled substance. Amador's testimony was only that Jimmy was inside the Bar while Jesse was outside the car, standing several feet away, while Amador entered the car, closed the door, and examined the funds (S/F 38). Amador did not indicate that Jesse even saw the money or know that the backpack, containing the currency, was in the car.

Officer Dan O'Sullivan was the State's next witness. He testified that he had established surveillance around the perimeter of the"El Mariachi" Bar while Amador was negotiating therein for the cocaine purchase with Diaz and Chewy. When Amador left for Pasadena, O'Sullivan immediately arrested Petitioner, removed him from the vehicle, and then discovered a 9mm Baretta handgun hidden in between the driver's seat and the center console (S/F 93-95). He turned over both the bag of money and the pistol to Sgt. Greg Dalton, supervisor of the Pasadena Police Department's narcotics squad. On the basis of this testimony *alone*, the trial court made an affirmative finding that Petitioner "used" a deadly weapon in the commission of the offense (T.-33).

O'Sullivan further testified that although he had participated in the arrests of both Jimmy Vitela and Jesse Vitela, he had had no conversation with either of them, either before or after the arrests.

Finally, Sgt. Greg Dalton testified that he had received the Beretta pistol from O'Sullivan, found by O'Sullivan between the front seat and the console of the automobile used by Diaz. He admitted that he did not see *any* of the Defendants up close and could not identify either

Vitela, nor was there any evidence reported in the Record that he may have had any discussion with Jesse or Jimmy Vitela.

It is important to consider that neither in the entire 132 pages of the Statement of Facts, nor from the four State witnesses, is that *any* inculpatory evidence even remotely linking the Petitioner, Jesse Vitela, to the offense alleged in the indictment, except possibly that which has been described in the above paragraphs. In fact, there is virtually no other testimony *and scarcely any other mention* of Jesse Vitela in the Record except the brief recounting of his arrest by Officers O'Sullivan and Dalton.

To phrase it affirmatively, there is *no evidence whatsoever* that Jesse or Jimmy Vitela knowingly or intentionally financed or invested funds that he knew or believed were intended to further the commission of the offense of possession of more than 400 grams of cocaine. Accordingly, the only theoretically possible way to sustain Appellants' conviction is through a tenuous theory of "parties," but in view of the applicable standard of proof beyond a reasonable doubt, even that theoretical possibility is without support in the Record.

After Sgt. Dalton testified, the State rested and the Defendant Jesse Vitela took the stand. He denied any knowledge of the existence of the bag containing the money or the presence of the gun until after he was arrested, or the purpose of the meeting with Amador, or any intention to invest in or finance the purchase of any cocaine. The Court obviously did not believe him and found all three Defendants guilty.

SOLE ISSUE ON APPEAL

Whether the trial Court committed reversible error in finding Appellants guilty because the evidence was glaringly insufficient to prove that they intentionally or knowingly financed or invested funds which they knew or believed were intended to further the commission of possession of cocaine, a controlled substance.

ARGUMENT

To prove the offense of illegal investment in the fact situation presented here, the State is required to prove that the Appellants *knowingly* or *intentionally* financed or invested funds he knew or believed were intended to further the commission of the offense of possession of more than 400 grams of cocaine. **Tex. Health & Safety Code Ann. § 481.126(b);** *see also Estrada v. State*, 810 S.W.2d 447, 449 (Tex. App.- San Antonio 1991, pet. ref'd.).

Mere presence at the scene of the offense, or close proximity thereto, does not prove guilt or make one a party to the offense of illegal investment, nor does it establish knowing possession of cocaine. "...(T)he evidence *must* affirmatively link the accused' to the drug in which he was illegally investing or financing. *Payne v. State*, 480 S.W.2d 732, 734 (Tex. Crim. App. 1972); *Humason v. State*, 728 S.W.2d 363, 366-67 (Tex. Crim. App. 1987). The law of parties requires at least that the accused assist or attempt to assist another in committing the offense. There is no such proof in this Record, only a showing that Petitioners were present in the vicinity during the commission of the offense.

Affirmative links may be proved by circumstantial evidence; however, "proof" amounting only to a strong suspicion or even a probability will not suffice. *Walden v.*

State, 579 S.W.2d 499, 501-02 (Tex. Crim. App. 1979). Proof beyond reasonable doubt is required, not one presumption piled on top of another, resting on still other assumptions.

In reviewing sufficiency of the evidence on appeal, this Court should follow the standard established by the Court: "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.". *Dickey v. State*, 693 S.W.2d 386, 387 (Tex. Crim. App. 1984) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, n. 12 (1979)); *Saxton v. State*, 804 S.W.2d. 910, 914 (Tex Crim. App. 1991).

Even the very best prosecutorial light placed upon the entirety of the evidence before the trial court cannot sustain this burden. It seems fair to say, on balance, that the record reflects only that the Petitioner, Jesse Vitela was seen in a car containing money and a gun, but there was no evidence that Petitioner was aware that either the money or the gun were in the car. *It was not his car.* The State failed to show that the Petitioner financed or invested, or assisted in the financing or investing, of any funds used by the other two men in the cocaine deal at the cantina. The record fails to show that the Petitioner even saw or knew about the money in the backpack, or that he knew or believed that any of the funds were intended, so far as he knew, to further the commission of the offense of the possession of more than 400 grams of cocaine. *The evidence is simply non-existent* that Petitioner engaged in any of the conduct as alleged in the indictment.

Without deliberate care, a reviewing court may misconstrue the *Jackson v. Virginia* test and affirm a conviction merely because "some" evidence exists on each

element of the offense. This in effect would be to revert to the "no evidence' standard of *Thompson v. Louisville*, 362 U.S. 199; 80 S.Ct. 624; 4 L.Ed. 254 (1960). Simply because the prosecution introduces evidence on an element of the offense which tends to make the existence of that element *slightly* more probable than it would be without the evidence does not satisfy the "Due Process" demands under *Jackson v. Virginia*, *supra*. This is a "mere modicum" of evidence, and it cannot be rationally argued that a "modicum" of evidence, by itself, could adequately support a conviction beyond a reasonable doubt. This case would provide an unusual opportunity for the Court to illustrate whether the prosecution has proven beyond a reasonable doubt each element of the alleged crime, and not simply proven a *possible explanation* of the alleged crime.

In *Saunders v. State*, 817 S.W.2d 688, 693 (Tex. Crim. App., 1991), the Court of Criminal Appeals held that uncontradicted, exculpatory evidence may not be disregarded by a rational jury: "Rational jurors may not utterly disregard undisputed evidence without a sensible basis for thinking it unreliable any more than they may assume a critical part of the proof without evidence having an inclination to confirm it." The onus of a criminal conviction cannot be sustained if it is predicated in all or in part on mere conjecture. *Dickey v. State*, 693 S.W.2d 386, 389 (Tex. Crim. App. 1984).

Both the trial court and the Court of Appeals assumed and conjectured to fill in the evidentiary holes in the State's cases, and this Court's review and analysis would greatly contribute to judicial wisdom and reliability in analyzing future cases to determine if the evidence sufficiently connects the accused to the prohibited drugs to sustain a conviction for "illegal investment" or possession.

CONCLUSION

Petitioners pray that this Court grant this Petition for Certiorari, and upon the Court's review, that the Court reverse the Texas Court of Appeals and demand that the State comply with the Due Process Clause of the 14th Amendment by proving its case with solid evidence, not presumptions and assumptions that fail dismally to establish guilt beyond a reasonable doubt.

Respectfully submitted,

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APPENDIX A
(JIMMY VITELA)

I.

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

August 23, 1995
COA#: 01-94-00407-CR
RE: Case No. 0699-95
STYLE: VITELA, JIMMY

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: BEN G LEVY
3120 SOUTHWEST FREEWAY
SUITE 222
HOUSTON, TX 77098-4510

II.

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

June 21, 1995
COA#: 01-94-00407-CR
RE: Case No. 0699-95
STYLE: VITELA, JIMMY

I have this day received and filed the Appellant's petition for discretionary review.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: BEN G. LEVY
3120 SOUTHWEST FREEWAY
SUITE 222
HOUSTON TX 77098-4510

III.

June 15, 1995

FIRST COURT OF APPEALS
1307 San Jacinto, 10th Floor
Houston, Texas 77002

Re: Case No. 01-94-00407-CR

Style: Vitela, Jimmy
v. Texas, The State of

Please be advised applicant's petition for discretionary review has been filed in the above referenced cause.

T.C. Case # 665435

Ben Levy
3120 Southwest Frwy., Suite 222
Houston, TX 77098

IV.

COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

JIMMY VITELA CAUSE NO. 01-94-0407-CR
vs.
STATE OF TEXAS

ORDER

On this 9th day of June, 1995, came on to be considered the motion of the appellant's counsel for an extension of time in which to file the Appellant's Petition for Discretionary Review.

AND SUCH MOTION is hereby granted, the time for filing the said item has been extended to the 19th day of June, 1995.

IT IS SO ORDERED.

PER CURIAM

SPECIAL NOTE: The Petition for Discretionary Review MUST be filed with the Court of Appeals.

A TRUE COPY ATTEST:

Thomas Lowe, Clerk
Court of Criminal Appeals

By: /s/ Louise Pearson
Deputy Clerk

V.

FIRST COURT OF APPEALS
1307 San Jacinto, 10th Floor
Houston, Texas 77002

April 6, 1995

RE: Case No. 01-94-00407-CR

Style: Vitela, Jimmy
v. Texas, The State of

The Court today GRANTED applicant's motion for extension of time to file motion for rehearing in the above referenced cause and the motion for rehearing heretofore received be duly filed as of this date.

T. C. Case # 665435 Margie Thompson, Clerk

Ben Levy
3120 Southwest Frwy., Suite 222
Houston, TX 77098

VI.

March 29, 1995

FIRST COURT OF APPEALS
1307 San Jacinto, 10th Floor
Houston, Texas 77002

RE: Case No. 01-94-00407-CR

Style: Vitela, Jimmy
v. Texas, The State of

Please be advised applicant's motion for rehearing was filed today in the above referenced cause.

T. C. Case # 665435 Margie Thompson, Clerk

Ben Levy
3120 Southwest Frwy., Suite 222
Houston, TX 77098

VII.

Judgment affirmed and Opinion filed March 9, 1995

In The
COURT OF APPEALS
For The
FIRST DISTRICT OF TEXAS

NO. 01-94-00407-CR

JIMMY VITELA, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 665,435

O P I N I O N

After a bench trial, the court found appellant, Jimmy Vitela, guilty of illegal investment and assessed punishment at nine years confinement and a $50,000 fine.[1] We affirm.

Officer Rudy Amador of the Pasadena Police Department narcotics division testified that a confidential informant contacted him in May 1993 and told him that an individual named Ramon Diaz wanted to purchase a large

[1] Appellant's trial was consolidated with those of his co-defendants, Jesse Vitela and Ramon Domingo Diaz. All three were found guilty of illegal investment.

quantity of cocaine. The informant provided Officer Amador with Diaz's pager number so that he could make contact. The officer called the pager number and made arrangements to meet the person with whom he spoke at a gas station at the intersection of Telephone Road and Loop 610.

Between May 7 and May 18, 1993, Officer Amador met with Diaz twice, and spoke with him over the phone three times, regarding the sale of cocaine for $16,000 per kilogram. Diaz contacted the officer again on May 26, 1993. During this conversation, Diaz told Officer Amador that he had people from Louisiana who wanted to buy 10 kilograms of cocaine, and others lined up to buy a total of 45 kilograms. Diaz told the officer he had the money and asked him to meet him at 7:00 p.m. in the parking lot of a store at Interstate 45 and Park Place in Houston.

Six Pasadena police officers set up surveillance at the location. Diaz drove up and told Officer Amador to follow him to another location to see the money. The officer agreed and notified the other officers on his police radio. Officer Amador followed Diaz to a bar on the North Freeway. The officer went inside where he waited with Diaz for someone to arrive with the money. After waiting for a while, Diaz left to page someone. He returned to tell the officer that the person with the money was driving a truck similar to the one the officer drove and would arrive within about five to 10 minutes.

After a few minutes, a man arrived driving a truck similar to the officer's. The man, identified by Diaz as "Chewy," was later identified as Jesus Fuentes. Diaz asked Chewy if he had the money. The officer testified that a few minutes later a third person came into the bar, approached the group and introduced himself to the officer as "Jimmy." The officer identified appellant as this man. According to

the officer, appellant told Chewy that the money was in a black backpack behind the seat of the car appellant came in. At that point, Officer Amador, Chewy and Diaz went outside; appellant stayed in the bar. Another man, later identified as appellant's brother Jesus (Jesse) Vitela (the brother), was sitting in a Ford Thunderbird parked outside; he was in the front passenger seat. Chewy motioned for the brother to get out of the car and he complied. Officer Amador testified that he and Chewy got into the car and closed the doors. Chewy reached behind the seat to retrieve the backpack appellant had described. The backpack was filled with an assortment of currency. Officer Amador closed the bag and replaced it behind the seat. While the officer and Chewy were in the car, the brother and Diaz stood about two to three feet outside the car on the passenger side.

Leading the men to believe he was going to get the cocaine, Officer Amador got into his truck and told Diaz to follow. The brother moved the Thunderbird, which was blocking Diaz' vehicle, and Diaz got into his vehicle and followed the officer. When they reached Pasadena, two marked patrol units stopped Diaz and he was arrested.

The evidence shows that meanwhile, still at the bar, the officers who had been conducting surveillance approached the Thunderbird where the brother was sitting in the driver's seat, apparently talking on a cellular telephone. The brother was removed from the car and taken into custody. Officer Dan O"Sullivan testified he found a semi-automatic pistol sticking up between the driver's seat and the center console. The 9 mm pistol was fully loaded and the safety was off. Officer O'Sullivan found the black backpack containing $73,000 in cash on the floorboard behind the

driver's seat. Appellant was arrested inside the bar. Chewy was also arrested.

Appellant's brother testified that he accepted appellant's offer to go with him to "ride around." Appellant drove their uncle's Thunderbird and the brother sat on the passenger side on the way to the bar. They were the only two in the car. According to the brother, appellant told him to come with him and he would get the brother something to eat. The brother maintained that he was not aware of the backpack until he saw Officer Amador and Chewy get it from behind the seat. The brother testified that he stayed in the driver's seat of the Thunderbird after Diaz and Officer Amador had left because he was talking to an ex-girlfriend on the phone. He claimed he did not know the gun was in the car until the officer pulled it out. He explained that because he was talking on the telephone, he did not notice the gun. He said that he did not see appellant put the gun or money in the car.

The brother further testified that when they arrived at the bar, appellant told him to wait while appellant went inside. The brother explained that he was not old enough to go into the bar. The brother was 18 years old and appellant was 19 years old. According to the brother, appellant did not tell him why he was going into the bar.

Appellant did not testify.

In his sole point of error, appellant asserts the evidence was insufficient to prove appellant intentionally or knowingly financed or invested funds that he knew or believed were intended to further the commission of possession of cocaine.

In considering the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the trial court's ruling to determine if any rational trier of fact could have found the essential elements of the offense established beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991). The trial court, as the trier of fact, acts as the sole judge of the credibility of the witnesses and may choose to believe or disbelieve all or any part of a witness' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986), *cert. denied*, 488 U.S. 872 (1988). The same standard applied to both direct and circumstantial evidence. *Geesa v. State*, 820 S.W.2d 154, 160-61 (Tex. Crim. App. 1991).

Here, the indictment charged that appellant "unlawfully intentionally and knowingly financed or invested funds [he] knew or believed were intended to further the commission of possession of a controlled substance, namely cocaine, weighing at least 400 grams...." *See* TEX. HEALTH & SAFETY CODE ANN. 481.126(a)(2).[2] The statute is not limited to an accused's investment of his personal funds; rather, it is broad enough to encompass the gathering together or the finding of money for a purchase. *Jordan v. State*, 816 S.W.2d 89, 92 (Tex. Crim. App. 1991). A defendant can be equally responsible even if another individual supplies the money for the transaction. *Lopez v. State*, 817 S.W.2d 150, 153 (Tex. App.--El Paso 1991, no pet.) Further, it is not necessary that the defendant

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[2] The illegal investment statute in effect at the time appellant was indicted and tried has since been amended. Act of May 16, 1989, 71st Leg., R.S., ch 678, § 1, 1989 Tex. Gen. Laws 2941, *amended* by Act of May 29, 1993, 73rd Leg., R.S. ch. 900, § 2.02, 1993 Tex. Gen. Laws 3710. (current version at Tex. Health & Safety Code Ann. § 481.126 (a)(2) (Vernon Supp. 1995)).

actually receive the controlled substance. *Rezapour v. State*, 817 S.W.2d 67, 69 (Tex. Crim. App. 1991).

A person is criminally responsible as a party to an offense if "acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids or attempts to aid the other person to commit the offense." TEX. PENAL CODE ANN. § 7.02(a)(2)(Vernon 1994). Evidence is sufficient to support a conviction under the law of parties where the actor is physically present at the commission of the offense and encourages the commission of the offense, either by words or other agreement. *Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim. App. 1985), *cert. denied*, 476 U.S. 101 (1986).

In a jury trial, if the evidence supports a charge on the law of parties, a court may so instruct the jury even when the indictment contains no such allegation; thus, it also appropriate for a judge to consider the law of parties at a bench trial. *Becker v. State*, 840 S.W.2d 743, 746 (Tex. App.--Houston [1st Dist.] 1992, no pet.).

In determining the defendant's culpability, the court may look to events that occurred before, during and after the commission of the offense, and may rely on any actions that show an understanding or common plan or design. *Beardsley v. State*, 738 S.W.2d 681, 684 (Tex. Crim. App. 1987); *Moore v. State*, 804 S.W.2d 165, 166 (Tex. App.--Houston [14 Dist.] 1991, no pet.) While mere presence at the scene of an offense is insufficient to sustain a conviction, it is a circumstance tending to prove guilt that, considered with other circumstances, may demonstrate that the accused participated in the criminal activity. *Harris v. State*, 646 S.W.2d 447, 457-58 (Tex. Crim. App. 1983).

Here, the evidence of appellant's involvement is uncontested. Testimony showed that appellant drove a car to the bar where Officer Amador was waiting with Diaz and Chewy. The three were waiting for someone to arrive with a substantial amount of money to pay for a large quantity of cocaine. The officer testified that appellant came into the bar and told Chewy that the money was in a black backpack behind the seat of the car appellant had driven to the bar. The black backpack, filled with $73,000 in cash, was where appellant said it was. We conclude the evidence is sufficient to support appellant's conviction.

Appellant erroneously relies on *Cox v. State*, 832 S.W.2d 379 (Tex. App.--Beaumont 1992, no pet.). In *Cox*, the court found the evidence insufficient to find the defendant guilty as a principal and reversed the conviction because the charge did not authorize the jury to apply the law of parties. Here, the trial court could have found appellant guilty as a party.

We overrule appellant's sole point of error.

We affirm the judgment.

/s Margaret Garner Mirabal
Margaret Garner Mirabal
Justice

Justices Cohen and Wilson also sitting.

Do not publish. Tex. R. App. P. 90.

Judgment rendered and opinion delivered MAR 9 1995
True Copy Attest:

/s/ Margie Thompson
Margie Thompson
Clerk of Court

APPENDIX B
(JESSE VITELA)

I.

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

August 23, 1995
COA#: 01-94-00474-CR
RE: Case No. 0663-95
STYLE: VITELA, JESSE

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: BEN G LEVY
3120 SOUTHWEST FREEWAY
SUITE 222
HOUSTON TX 77098-4510

II.

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

June 13, 1995
COA#: 01-94-00474-CR
RE: Case No. 0663-95
STYLE: VITELA, JESSE

I have this day received and filed the Appellant's petition for discretionary review.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: BEN G. LEVY
3120 SOUTHWEST FREEWAY
SUITE 222
HOUSTON TX 77098-4510

III.

FIRST COURT OF APPEALS
1307 San Jacinto, 10th Floor
Houston, Texas 77002

June 7, 1995

RE: Case No. 01-94-00474-CR

Style: Vitela, Jesse
v. Texas, The State of

Please be advised applicant's petition for discretionary review has been filed in the above referenced cause.

T. C. Case # 665,434

Ben Levy
3120 Southwest Frwy., Suite 222
Houston, TX 77098

IV.

COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

JESSIE VITELA CAUSE NO. 04-94-0474-CR
VS.
STATE OF TEXAS

O R D E R

On this 16TH day of MAY. 1995, came on to be considered the motion of the appellant's counsel for an extension of time in which to file the Appellant's Petition for Discretionary Review.

AND SUCH MOTION is hereby granted, the time for filing the said item has been extended to the 7TH day of JUNE, 1995.

IT IS SO ORDERED.

PER CURIAM

SPECIAL NOTE: The Petition for Discretionary Review MUST be filed with the Court of Appeals.

A TRUE COPY ATTEST:

Thomas Lowe, Clerk
Court of Criminal Appeals

By: /s/ Louise Pearson
Deputy Clerk

V.

Judgment affirmed and Opinion filed March 16, 1995

In The
COURT OF APPEALS
For The
FIRST DISTRICT OF TEXAS

NO. 01-94-00474-CR

JESSE VITELA, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 665,434

O P I N I O N

After a bench trial, the court found appellant, Jesse Vitela, guilty of illegal investment and assessed punishment at nine-years confinement and a $50,000 fine.[1] The trial court made an affirmative finding that appellant used a deadly weapon in the commission of the offense. We affirm.

Officer Rudy Amador of the Pasadena Police Department narcotics division testified that a confidential informant contacted him in May 1993 and told him that an

[1] Appellant's trial was consolidated with those of his co-defendants, Jimmy Vitela and Ramon Domingo Diaz. All three were found guilty of illegal investment.

individual named Ramon Diaz wanted to purchase a large quantity of cocaine. The informant provided Officer Amador with Diaz' pager number so that he could make contact. The officer called the pager number and made arrangements to meet the person with whom he spoke at a gas station at the intersection of Telephone Road and Loop 610.

Between May 7 and May 18, 1993, Officer Amador met with Diaz twice, and spoke with him over the phone three times, regarding the sale of cocaine for $16,000 per kilogram. Diaz said he was a broker who was negotiating for others; Diaz expected to earn about $2,000 per kilogram for his brokerage services. Diaz contacted the officer again on May 26, 1993. During this conversation, Diaz told Officer Amador some people were in town from Louisiana who wanted to buy 10 kilograms of cocaine. Diaz also said he had others lined up to buy an additional 35 kilograms that day. Diaz told the officer he had the money on hand and asked the officer to meet him at 7:00 p.m. in the parking lot of a store at Interstate 45 and Park Place in Houston.

Six Pasadena police officers set up surveillance at the location. Diaz drove up and told Officer Amador to follow him to another location to see the money. The officer agreed and notified the other officers on his police radio. Officer Amador followed Diaz to a bar on the North Freeway. The officer went inside where he waited with Diaz for someone to arrive with the money. After waiting for a while, Diaz left to page someone. He returned to tell the officer that the person with the money was driving a truck similar to the one the officer drove and would arrive within about five to 10 minutes.

After a few minutes, a man arrived driving a truck similar to the officer's. The man, identified by Diaz as "Chewy", was later identified as Jesus Fuentes. Diaz talked

with Chewy about the money. Officer Amador testified that a few minutes later a third person came into the bar, came straight to the table, shook Chewy's hand, shook Diaz' hand and introduced himself to the officer as "Jimmy." According to the officer, Jimmy told Chewy that the money was in a black backpack behind the seat of the car Jimmy came in. At that point, Officer Amador, Chewy and Diaz went outside, Jimmy stayed in the bar. Another man, later identified as Jimmy's brother, Jesus (Jesse) Vitela (the appellant), was sitting in a Ford Thunderbird parked outside; he was in the front passenger seat. Chewy motioned for appellant to get out of the car, and appellant got out of the passenger side to let Officer Amador in. Chewy got in and sat in the front driver's seat. They closed the car doors. Chewy reached behind the seat to retrieve the backpack appellant's brother had described. The backpack was full of cash. Officer Amador closed the bag and replaced it behind the driver's seat. While the officer and Chewy were in the car, appellant and Diaz stood about two to three feet away from the car on the passenger side.

When the officer and Chewy exited the car, the officer told Diaz "that we were supposed to leave and pick up the cocaine and be back within an hour." Appellant moved the Thunderbird, which was blocking Diaz' vehicle, and Diaz got into his vehicle and followed the officer. When they reached Pasadena, two marked patrol units stopped Diaz and he was arrested.

The evidence shows that meanwhile, still at the bar, the officers who had been conducting surveillance approached the Thunderbird where appellant was sitting in the diver's seat, apparently talking on a cellular telephone. Appellant was removed from the car and taken into custody. Officer Dan O'Sullivan testified he found a semi-automatic pistol sticking up between the driver's seat and the center

console. The nine mm pistol was fully loaded, the safety was off, and the barrel of the gun was down. Officer O'Sullivan found the black backpack containing $73,000 in cash on the floorboard behind the driver's seat. Appellant's brother, Jimmy, was arrested inside the bar. Chewy was also arrested.

Appellant testified that he accepted his brother's offer to go "ride around." The brother drove their uncle's Thunderbird and appellant sat on the passenger side on the way to the bar. They were the only two in the car. According to appellant, his brother told him to come with him and he would get appellant something to eat. Appellant maintained that he was not aware of the backpack until he saw Officer Amador and Chewy get it from behind the seat. Appellant testified that he stayed in the driver's seat of the Thunderbird after Diaz and Officer Amador had left because he was talking to an ex-girlfriend on the phone. He said he was arrested about ten minutes after Diaz and the officer left. He claimed he did not know the gun was in the car until the officer pulled it out. He explained that because he was talking on the telephone, he did not notice the gun. He said he did not see his brother put the gun or the money in the car. He said his father left this gun in the car, just as he had left another gun in the car earlier when appellant was convicted for possession of a weapon.

Appellant further testified that when they arrived at the bar, his brother told him to wait while he went inside. Appellant expected he would not be able to go into the bar anyway because he was not 21. Appellant was 18 years old and his brother was 19 years old. According to appellant, his brother did not tell him why he was going into the bar.

Appellant's brother, Jimmy, did not testify.

In his sole point of error, appellant asserts the evidence was insufficient to prove appellant intentionally or knowingly financed or invested funds which he knew or believed were intended to further the commission of possession of cocaine. Appellant also asserts the deadly weapon finding is not supported by the evidence.

In considering the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the trial court's ruling to determine if any rational trier of fact could have found the essential elements of the offense established beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307. 319. 99 S.Ct. 2781, 2789 (1979); *Saxton v. State*, 804 S.W.2d 910, 914 (Tex Crim. App. 1991). The trial court, as the trier of fact, acts as the sole judge of the credibility of the witnesses and may choose to believe or disbelieve all or any part of a witness' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986), *cert. denied*, 488 U.S. 872 (1988). The same standard applies to both direct and circumstantial evidence. *Geesa v. State*, 820 S.W.2d 154, 160-61 (Tex. Crim. App. 1991).

Here, the indictment charged that appellant "unlawfully intentionally and knowingly financed or invested funds [he] knew or believed were intended to further the commission of possession of a controlled substance, namely cocaine, weighing at least 400 grams...." *See* Tex. Health & Safety Code Ann. 481.126(a)(2).[2] The statute is not

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[2] The illegal investment statute in effect at the time appellant was indicted and tried has since been amended. Act of May 16, 1989, 71st Leg. R.S., ch 678, § 1, 1989 Tex. Gen. Laws 2230, 2941 *amended* by Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 2.02, 1993 Tex. Gen. Laws 3705, 3710.

BEST AVA

limited to an accused's investment of his personal funds; rather, it is broad enough to encompass the gathering together or the finding of money for a purchase. *Jordan v. State*. 816 S.W.2d 89, 92 (Tex. Crim. App. 1991). A defendant can be equally responsible even if another individual supplies the money for the transaction. *Lopez v. State*, 817 S.W.2d 150, 153 (Tex. App.--El Paso 1991, no pet.) Further, it is not necessary that the defendant actually receive the controlled substance. *Rezapour v. State*, 817 S.W.2d 67, 69 (Tex. Crim. App. 1991).

A person is criminally responsible as a party to an offense if "acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids or attempts to aid the other person to commit the offense." Tex. Penal Code Ann. § 7.02(a)(2) (Vernon 1994). Evidence is sufficient to support a conviction under the law of parties where the actor is physically present at the commission of the offense and encourages the commission of the offense, either by words or other agreement. *Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim. App. 1985), *cert. denied*, 476 U.S. 101 (1986).

In a jury trial, if the evidence supports a charge on the law of parties, a court may so instruct the jury even when the indictment contains no such allegation; thus, it also appropriate for a judge to consider the law of parties at a bench trial. *Becker v. State*, 840 S.W.2d 743, 746 (Tex. App.--Houston [1st Dist.] 1992, no pet.).

In determining the defendant's culpability, the court may look to events that occurred before, during and after the commission of the offense, and may rely on any actions that show an understanding or common plan or design. *Beardsley v. State*, 738 S.W.2d 681, 684 (Tex. Crim. App. 1987); *Moore v. State*, 804 S.W.2d 165, 166 (Tex. App.--

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Houston [14th Dist.] 1991, no pet.) While mere presence at the scene of an offense is insufficient to sustain a conviction, it is a circumstance tending to prove guilt that, considered with other circumstances, may demonstrate that the accused participated in the criminal activity. *Harris v. State*, 646 S.W.2d 447, 457-58 (Tex. Crim. App. 1983).

Testimony established that appellant rode with his brother to the bar. Appellant's brother entered the bar, walked straight to Chewy and the others, and told Chewy the money was in a black backpack in the car. Appellant waited for about 15 minutes while his brother was inside. The evidence showed that a black backpack containing $73,000 in cash was stored behind the driver's seat of the car. Officer Amador testified that when Chewy motioned to appellant, he got out of the car, and then stood with Diaz watching the activity inside the car from two to three feet away, just outside the passenger side. The trial court could have reasonably concluded that appellant knew both Chewy and Diaz; appellant did not speak to, or ask any questions of, either Chewy or Diaz-- appellant simply tacitly cooperated. When Officer Amador got out of the car and told Diaz to follow him so they could get the cocaine and return in an hour, appellant was apparently still standing next to Diaz. Appellant moved the car to allow Diaz and the officer to leave, and then remained in the driver's seat. When appellant was arrested, the backpack containing $73,000 was still safely stored behind the driver's seat. A loaded nine mm pistol, with the safety off, was found next to appellant, between the driver's seat and center console. The top half of the gun was sticking up, readily accessible and clearly visible. The trial court could have reasonably concluded from the evidence that the pistol had been in that position while appellant was in the car, alone, for at least 25 minutes (15 minutes while he waited for Chewy, Diaz and the officer to exit the bar, and ten minutes more after they had left to

get the cocaine). The trial court apparently did not believe appellant's testimony that he did not see the gun in the car; he knew nothing about the backpack or the drug transaction; he stayed in the car simply because his 19-year old brother said to wait, and because appellant, who was 18, figured they would not let him in the bar anyway because he was not 21 (as he watched his 19-year-old brother go in). From all the evidence, and the reasonable inferences to be drawn from the evidence, the trial court could have reasonably concluded, beyond a reasonable doubt, that appellant knowingly played a key role in the drug transaction; he guarded the $73,000 cash purchase-money while his brother went in the bar to talk to the broker, seller and buyer, and he knowingly continued to guard the money until Diaz and the officer returned or until further instructions from his brother, who was waiting in the bar for a call about whether the cocaine had been delivered. We conclude the evidence was sufficient to support appellant's conviction, and to support the deadly weapon finding.

Appellant erroneously relies on *Cox v. State*, 832 S.W.2d 379 (Tex. App.--Beaumont 1992, no pet.). In *Cox*, the court found the evidence insufficient to find the defendant guilty as a principal and reversed the conviction because the charge did not authorize the jury to apply the law of parties. Here, the trial court could have found appellant guilty of illegal investment as a party.

We overrule appellant's sole point of error.

We affirm the judgment.

/s/ Margaret Garner Mirabal
Margaret Garner Mirabal
Justice

Justices Cohen and Wilson also sitting.

Justice Cohen dissenting.

Do not publish. Tex. R. App. P. 90

Justice O'Connor requested a vote to determine if the case should be heard en banc,pursuant to Tex. R. App. P. 79(d), (e) and Tex. R. App. P. 90(e).

Chief Justice Oliver-Parrott and Justices Cohen, Hutson-Dunn, Mirabal, Wilson, Hedges and Andell voted against en banc consideration. Justice Taft did not participate.

Justice O'Connor dissented from the denial of en banc consideration and joins Justice Cohen's dissent.

Judgment rendered and opinion delivered MAR 16 1995
True Copy Attest:

/s/ Margie Thompson
Margie Thompson
Clerk of Court

V.

In The
COURT OF APPEALS
For The
FIRST DISTRICT OF TEXAS

NO. 01-94-00474-CR

JESSE VITELA, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 665,434

DISSENTING OPINION

I would sustain appellant's point of error and render a judgment of acquittal. Appellant was in a car containing money and a gun. The money was on the floor in the back seat enclosed in a backpack. It was not in plain view, and there was no evidence appellant saw the money or knew about it. Appellant was outside the car when Chewy let Officer Amador look in the backpack. No evidence showed appellant owned the car or was connected with it at any other time. His brother drove it to the bar while appellant was the passenger. Appellant never touched the backpack and never said anything incriminating, although appellant may have heard Officer Amador tell Diaz to follow him (Amador) and pick up the cocaine.

It seems to me that there is little or nothing to incriminate appellant except guilt by association with his brother. The law of parties requires more than that. It requires that appellant aid or attempt to aid another in committing the offense. Mere presence is not sufficient.

The evidence might be sufficient to convict appellant of possessing the gun, although, in my opinion, even that is questionable. The circumstances are suspicious, and appellant's testimony may have been incredible. Nevertheless, I doubt that a reasonable jury could find such evidence proves guilt beyond a reasonable doubt to this offense.

I respectfully dissent.

/s/ Murry B. Cohen
Murry B. Cohen
Justice

Justices Mirabal and Wilson also sitting.

Justice O'Connor joins this dissenting opinion.

Do not publish. Tex. R. App. P. 90